

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL

77-1072

United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

Appellees,

-against-

PHILIP ARCURI,

Appellant.

*On Appeal From The United States District
Court For The Eastern District of New York*

APPELLANT'S BRIEF



MARTIN LIGHT
Attorney for Appellant
66 Court Street
Brooklyn, New York
(212) 834-8888

TABLE OF CONTENTS

TABLE OF CASES	Page 1
PRELIMINARY STATEMENT	Page 2
STATEMENT OF FACTS	Pages 3 & 4
STATEMENT OF ISSUES	Page 5
POINT ONE	Pages 6 thru 10
The evidence was insufficient to submit to the jury or sustain the guilty verdict.	
CONCLUSION	Page 11

TABLES OF CASES

Glasser v United States	315 US 60	Page 6
In re Winship	377 US 358	Page 7
Kibbe v Henderson	534 F 2d 493	Page 6
United States v Andreadis	366 F 2d 423	Page 6
United States v McCarthy	473 F 2d 300	Page 6
United States v Quinn	141 F 2d 622	Page 8
United States v Rivera	513 F 2d 519	Page 8
United States v Screws	325 US 91	Page 7
United States v Tavoularis	515 F 2d 1070	Page 7
United States v Wiley	519 F 2d 1348	Page 8

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction entered against Philip Arcuri on February 11, 1977 after a jury trial before Hon. Edward R. Neaher.

Appellant was sentenced to two years with eighteen months suspended, three years probation, followed by two years of special parole upon his conviction for violating Title 21, U.S.C. Section 841 (a)(i) and Title 18 U.S.C. Section 2.

STATEMENT OF FACTS

On May 20, 1976 Philip Arcuri entered a laundromat owned by the Government's principal witness, Joseph Grande.

Philip Arcuri and William Rothaar remained at the front of the store while Anthony Sciotto went to the rear office (transcript pages 32, 66-68).

Sciotto returned to the front of the store and the three men left. Surveillance teams observed the three men enter a pizza store and then walk back to the laundromat.

Grande met the three men in the street and the four of them proceeded to the laundromat office where Rothaar and Arcuri in turn was introduced to Grande and then to D.E.A. Agent McKinley (Transcript pages 70-71).

Grande said McKinley is the man who offered two cents and Arcuri shook his head and walked out. Grande asked if Arcuri wanted to talk to McKinley and Arcuri said Sciotto should talk to him (transcript page 74).

Rothaar said nothing and left with Arcuri. As they were exiting the premises both men were arrested.

During the trial the Government attempted to link Arcuri to a white Continental which had been identified

by Grande as the vehicle used to deliver the pills. Evidence was taken subject to connection under the conspiracy count which was dismissed by the Court.

STATEMENT OF ISSUES

Was there sufficient evidence to warrant submission of the charge to the jury?

Was there sufficient evidence to sustain the guilty verdict?

POINT ONE

THE EVIDENCE WAS INSUFFICIENT
TO SUBMIT TO THE JURY OR SUSTAIN
THE GUILTY VERDICT.

Philip Arcuri appeared at the laundromat at or about the time that Anthony Sciotto was to complete a transaction wherein he would sell three hundred thousand phenobarbitol pills. In fact, those pills had been confiscated by the D.E.A. Agent who covered the meeting.

At the outset appellant is cognisant of the rule that the verdict must be sustained on appeal if there is substantial evidence to support it, and that the evidence must be viewed most favorably to the Government (Glasser v United States 315 US 60, United States v McCarthy 473 F 2d 300 (2 cir. 1972; United States v Andreadis 366 F 2d 2 cir. 1966)).

The indictment charged in substance that Philip Arcuri knowingly or intentionally aided and abetted or wilfully caused the sale of a controlled substance.

In Kibbe v Hemmerson 534 F 2d 493 (2 cir. 1976) at page 497 this Court held that:

"...A criminal conviction must be supported by proof beyond a reasonable doubt of every fact necessary to constitute the crime charged."

This is a restatement of the law as set forth in both In re Winship 397 US 358 and United States v Screws 325 US 91.

The testimony at trial clearly shows that no person started any discussion of pills, the pills that had been delivered, or anything which might impute knowledge of the pills while Arcuri was present. In fact Agent McKinley said Arcuri put his head in the door and left (transcript pages 218-219). There is no testimony to show that Arcuri knowingly or intentionally participated in the sale of a controlled substance.

In United States v Tavoularis 515 F 2d 1070 (2 cir. 1975) this Court stated at page 1074:

"Where a substantive offense requires specific knowledge, that same knowledge must be established before a defendant can be found to be a member of a conspiracy to commit that offense. United States v Hysohion 448 F 2d 343, 342 (2 cir 1971). This applies equally to a aider and abettor as to a conspirator, and the requisite knowledge can not be imputed from one aider and abettor or conspirator to another. United States v Steward, 45 1 F 2d 1203, 1207 (2 cir 1971)."

The weight of the evidence received against Arcuri concerned itself with the white Continental which was seized after the arrest of the defendants. His link to the car was established over objection through items taken from

the glove compartment and his denial to D.E.A. of its ownership. All of the items were taken subject to connection since no one ever saw Arcuri at or near the car. The items were received in furtherance of the conspiracy count which was dismissed after the Government's case.

In United States v Rivera 513 F 2d 519 (2 cir 1975) this Court set forth the general rule as to when a criminal case should be submitted to the jury. This Court held at pages 528-529, that the:

"...standard we adopted in United States v Taylor 464 F 2d 240 (2 cir 1972), namely whether, as said in Curley v United States 81 US App D.C. 389, 160 F 2d 229, 232-33, cert. denied, 331 US 837, 67 Sct. 1511, 91 L Ed. 1850 (1947), "upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt."

This rule was reiterated in United States v Wiley 519 F 2d 1348, at 1349 (2 cir 1975) wherein the Court stated:

"In determining whether to submit a criminal case to a jury, the Court must determine whether upon the evidence taken as a whole, a reasonable mind might fairly conclude that the defendant was guilty beyond a reasonable doubt."

Guilt beyond a reasonable doubt can not be based upon suspicion which can never be a substitute for evidence (United States v Quinn 141 F 2d 622).

Is there evidence which pointed with absolute certainty to knowledge of what crime was to be committed? The evidence appears to sustain an extortionate plot not a drug case. This Court in United States v Tavoularis, supra, at 1077 stated the rule clearly"

"Our system of administering justice requires that a defendant, no matter how guilty he may be of some crime, can not be convicted unless there is proof beyond a reasonable doubt that he committed the particular crime with which he is charged."

The Government's evidence against Arcuri did not establish knowledge of the commission of any crime nor active participation. No action of Arcuri aided and abetted Sciotto or Grande and no conversation took place in Arcuri's presence which indicated that he knew of or was participating in any criminal conduct.

The statement by Sciotto to the affect that "these are the guys who came for the money" should have been excluded as inadmissible hearsay. The Federal Rules of Evidence, Rule 801 (d) (2D), sets forth that a statement made by a person other than the declarant may be offered in evidence at trial if it is made by a coconspirator during the course and in furtherance of the conspiracy. When the court dismissed the conspiracy count it ruled out the basis for the admission of the statement.

The main reason that the Court gave for permitting the case against Arcuri to be submitted to the jury was because of Sciotto's statement linking Arcuri to the crime. (Transcript page 505-506)

It is that very statement that was admitted because of the conspiracy count, and as an exception the hearsay rule. When the testimony was originally offered there was a defense objection and request for a limiting instruction, neither of which was done. (Transcript page 67).

It is respectfully submitted that the evidence linking the defendant to the commission of the crime charged was improperly received. That the evidence was not sufficient to allow the case to be submitted to the jury, and that it was legally insufficient to sustain a conviction.

CONCLUSION

THE CONVICTION OF PHILIP ARCURI
SHOULD BE REVERSED AND THE INDICT-
MENT DISMISSED.

Respectfully submitted,

Martin Light
Attorney for Appellant

AFFIDAVIT OF PERSONAL SERVICE

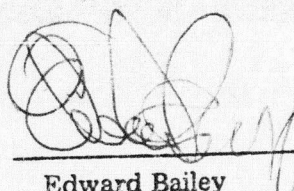
STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 11 day of August, 19 77 at No. 225 Cadman Plaza East, Brooklyn, NY

deponent served the within Brief
upon U.S. Atty., East. Dist. of NY

the Appellee herein, by delivering 3 true
copy(ies) thereof to him personally. Deponent knew the person so
served to be the person mentioned and described in said papers as the
Appellee therein.

Sworn to before me this
11 day of August 1977.


Edward Bailey


WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978